Supreme Court, U.S.
FILED
OCT 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1614; 87-1639; 87-1668

In The

Supreme Court Of The United States

October Term, 1988

JOHN W. MARTIN, et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents

THE PERSONNEL BOARD OF JEFFERSON COUNTY, ALABAMA, et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents.

RICHARD ARRINGTON, JR., et al.,
Petitioners,

v.

ROBERT K. WILKS, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS RICHARD ARRINGTON, JR. AND THE CITY OF BIRMINGHAM

JAMES K. BAKER
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

JAMES P. ALEXANDER
Counsel of Record

ROBERT K. SPOTSWOOD
RICHARD H. WALSTON
MICHAEL R. PENNINGTON
BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, AL 35203
(205) 252-4500

QUESTION PRESENTED

Whether the nonminority plaintiffs are barred from relitigating the lawfulness of race- and gender-conscious relief previously awarded to blacks and females in a judicially-approved consent decree, given that the nonminorities knew of the original litigation and the relief sought from the outset; that over the course of seven years, encompassing two fully litigated trials and an appeal, they knowingly failed to intervene in the original litigation; and that their present objections were made, considered, and rejected in the original proceedings before the relief was entered.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. Respondents Had Actual Notice Of The Original Litigation From Its Inception	1
II. Actual Notice Is Sufficient To Give Rise To The Opportunity For Full Participation Through Intervention	3
III. Preclusion For Failure To Intervene Is Both Constitutional And Consistent With Established Preclusion Law	5
IV. Joinder Is Not A Viable Mechanism For Ensuring Finality In Public Rights Litigation	12
V. Under The Facts Of This Case, Respondents Should Be Precluded From Relitigating The Lawfulness Of The Consent Decrees	13
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: *Page*

Black and White Children v. School District, 464 F.2d 1030 (6th Cir. 1972) 17

Carson v. American Brands, Inc., 450 U.S. 79, (1981) 9

Cummins Diesel Michigan, Inc. v. The Falcon, 305 F.2d 721 (7th Cir. 1962) 17

Ensley Branch NAACP v. Seibels, 13 E.P.D. ¶ 11,504 (N.D. Ala. 1977), *aff'd in relevant part,* 616 F.2d 812 (5th Cir. 1980), *cert. denied,* 449. U.S. 1061 (1980) 14

In re Birmingham Reverse Discrimination Employment Litigation, 833 F.2d 1492 (11th Cir. 1987) 11

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 16

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950) 3

NAACP v. New York, 413 U.S. 345 (1973) 5

NLRB v. Bildisco v. Bildisco, 465 U.S. 513 (1983) 7

National Equipment Rental v. Szukhent, 375 U.S. 311 (1964) 4

New York v. Irving Trust Co., 288 U.S. 329 (1933) 7

Penn-Central Merger and N&W Inclusion Cases, 389 U.S. 486 (1968) 5, 6, 7, 17

Prate v. Freedman, 430 F.Supp. 1373 (W.D.N.Y. 1977), *aff'd,* 573 F.2d 1294 (2nd Cir. 1977), *cert. denied,* 436 U.S. 922 (1978) 17

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 5, 7, 17

TABLE OF AUTHORITIES — (Continued)

Cases: *Page*

Sterling v. Environmental Control, Inc.,
793 F.2d 52 (2nd Cir. 1986) 4

Tulsa Professional Collection Service v. Pope,
108 S.Ct. 1340 (1988) 3

United States v. Jefferson County,
720 F.2d 1511 (11th Cir. 1983) 2, 3, 4, 17

Wuchter v. Pizzutti, 276 U.S. 13 (1928) 4

Statutes and Codes

29 C.F.R. § 1608.8 9

42 U.S.C. § 2000e 8

Fed. R. Civ. P. 24 .....8, 9, 12, 14, 16

Fed. R. Civ. P. 19 .....10, 12

Miscellaneous:

Advisory Committee Comments to
1966 Amendments of Rule 19, Fed. R. Civ. P. 5

F. James and G. Hazard, *Civil Procedure*,
§ 11.31 (3d ed. 1977) 5

ARGUMENT

The critical issue before the Court is how best to achieve finality of complex public rights litigation consistent with due process. Respondents and their amici do not dispute that finality and the policies it advances — judicial economy, efficacy of judgments, and confidence in the American system of jurisprudence, among others — must be a realistic possibility in public rights litigation. Nor do they challenge the City's assertion that finality can be achieved by application of its proposed rule — namely, that one who knowingly foregoes a meaningful opportunity timely to intervene in litigation is estopped to relitigate issues decided in that litigation.

Rather, respondents contend that: 1) they should not be precluded for their failure to intervene because there is no "record evidence" that they had actual notice of the original litigation; 2) the "preclusion for failure timely to intervene" rule proposed by the City necessarily violates due process regardless of the narrow circumstances in which it would apply; and 3) joinder is available as an adequate mechanism by which to attain finality. None of these contentions withstand scrutiny.

I. RESPONDENTS HAD ACTUAL NOTICE OF THE ORIGINAL LIGITATION FROM ITS INCEPTION

In tacit recognition of the force of the City's proposed rule, the Wilks respondents resort to a disingenuous attempt to extricate themselves from application of that rule. They conjure an illusion that they did not have actual notice of the original litigation challenging the promotional system which had yielded a lilly-white supervisory staff in the Birmingham Fire Department. They further suggest that they were not on adequate notice of the terms of the Consent Decrees before the Fairness Hearing. Conspicuously absent, however, is an explicit denial that respondents had actual notice of the litigation and the terms of the Decrees in ample time to protect their interests. Instead, they claim only that there is

"no evidence in the record" that respondents had actual notice of these matters, and that "adequate formal notice" was not "given." Wilks Br. at 28, 23. These carefully-crafted intimations, made for the first time in this Court, are contradicted by respondents' own admissions in the course of this litigation and by the findings of the court below.

The white firefighters have repeatedly admitted that they had actual notice of the original litigation and knowledge of the terms of the proposed Decrees. In pursuing their belated motion to intervene, the white firefighters conceded that they had been aware of the litigation from the outset, but sought to justify their seven-year delay on their alleged reliance upon the defendant Personnel Board. Affidavit of Billy Gray, J.A. 722. On appeal from the trial court's denial of intervention, the white firefighters affirmatively admitted that they did have actual notice of both the litigation and the Consent Decrees:

> The firefighters first learned of the proposed settlement when public notice was given in June, 1981. . . . While the firefighters were aware of the litigation, the evidence shows they were not aware of any settlement discussions which could affect their complex promotional rights until public notice of the decrees was given in June, 1981. . . . The evidence shows that the firefighters simply knew the action was being defended by the City and Personnel Board. They did not know that the varying relief which could possibly be granted under Title VII could adversely affect them in greater degrees in the event the existing defendants decided to settle the case.

Feb. 23, 1982 Brief of Appellants in *United States v. Jefferson County*, Appeal #81-7761 (11th Cir.), at 6, 17-18. Their reply brief in that appeal makes the same admission:

> The affidavit of Billy Gray acknowledges that the Firefighters knew of the pendency of this action . . . The affidavit of Billy Gray further shows that the Firefighters were unaware of the negotiations which resulted in the consent decrees *until public notice was given in June, 1981.*

May 24, 1982, Reply Brief of Appellants in *United States v. Jefferson County,* Appeal #81-7761 (11th Cir.), at 4, 5 (emphasis supplied).

Thus, it is not surprising that the Eleventh Circuit, in affirming the denial of intervention, found that "[t]he BFA members knew at an early stage in the proceedings that their rights could be adversely affected." *United States v. Jefferson County,* J.A. 154. *See also,* Id. at 159 (court notes "BFA members' early knowledge that their rights could be affected"). Moreover, depositions taken in the course of this litigation disclose that the white firefighters actually distributed and discussed the proposed Decrees in June, 1981, well before the Fairness Hearing. *See* September 17, 1984 Deposition of Billy Gray, Vol. II, pp. 110-116 and Ex. 3.

In the face of their admissions, respondents are understandably reluctant to deny before this Court that they had actual notice of the litigation and the terms of the Decrees in time to raise their arguments in opposition. However, their effort to promote an erroneous impression reflects an unfortunate lack of candor. Respondents have not denied actual notice because they cannot. Their own admissions, together with the affidavit of Billy Gray and the Eleventh Circuit's express finding of actual notice, leave no doubt whatsoever that the white firefighters did enjoy actual notice from "an early stage" in the litigation.

II. ACTUAL NOTICE IS SUFFICIENT TO GIVE RISE TO THE OPPORTUNITY FOR FULL PARTICIPATION THROUGH INTERVENTION

Respondents contend that *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306 (1950), and *Tulsa Professional Collection Service v. Pope,* ___ U.S. ___, 108 S.Ct. 1340 (1988), require that formal paper notice be given each known, interested individual by mail or personal service if preclusion is to result from failure to intervene. Respondents read those cases too broadly. *Mullane* and *Pope* hold only that to be constitutional, a *statute* contemplating final resolution of all claims known and unknown, whether or not asserted, must

provide for the "best notice practicable." Where the statute does not, it is constitutionally infirm on its face, and must be struck down entirely. For example, when a statute that purports to resolve the claims of all interested persons in certain funds or property does not provide constitutionally sufficient procedures to ensure actual notice to all interested stakeholders to the extent practicable, the actual notice of a particular stakeholder becomes irrelevant — it is the statute, not the notice to that stakeholder, that is unconstitutionally defective. *See e.g., Wuchter v. Pizzutti,* 276 U.S. 13, 24 (1928) (where statute does not require adequate procedures for notice, actual notice to a particular individual "cannot . . . supply constitutional validity to the statute or service under it"); *Sterling v. Environmental Control, Inc.,* 793 F.2d 52, 58 (2nd Cir. 1986) ("extrastatutory measures cannot render valid a statute unconstitutional on its face" for lack of adequate notice provisions). Hence, although Mr. Mullane's actual notice did not affect the result in *Mullane, Mullane* does not stand for the proposition that actual notice is insufficient for all purposes in the absence of individual written notice.

In *Mullane* and *Pope*, the Court struck down the *statutes* involved; the Court *did not find* that actual notice was always insufficient unless accomplished by formal paper notice. To the contrary, the Court has held that actual notice can satisfy the requirements of due process irrespective of the absence of formal, personal notice. *National Equipment Rental v. Szukhent,* 375 U.S. 311, 315 (1964).

That actual notice is sufficient to satisfy due process (so long as a facially invalid statute is not at issue) is self-evident. The constitutional requirement that a statute provide for the "best notice practicable" when it seeks to resolve the claims of all persons known or unknown is intended to ensure, to the extent possible, that potentially affected nonparties receive *actual notice.* Where no such statute is involved and the affected nonparties have actual notice, it makes no difference how the actual notice was achieved.

Any other result would be anomalous. Nonparties who did *not* receive notice would nonetheless be bound, so long as

proper procedures were followed, while nonparties with actual notice would not be bound unless proper formal procedures were followed. The law insists on the procedural form only to the extent necessary to ensure the protection of substantive rights. Here, that protection was accorded through the ultimate object of formal paper notice — *i.e.*, actual notice.

In any event, it is actual notice that triggers Rule 24; formal paper notice is not necessary. *NAACP v. New York*, 413 U.S. 345 (1973); Advisory Committee Notes to 1966 Amendments to Rule 19 (stating that "informal notice" is sufficient to enable an absentee to avert prejudice to himself by intervening). This is why paper notice was not a factor in the Court's analysis in *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968), or *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102 (1968), both of which focused upon the failure to intervene despite actual notice. There, as here, the manner in which notice was obtained is irrelevant, for no claims-barring statute is implicated. There, as here, the operative principles of preclusion are not statutory in nature; instead, they arise from equitable principles akin to the doctrine of estoppel. *See* F. James and G. Hazard, *Civil Procedure* § 11.31 at p. 652 (3d ed. 1977). Estoppel has always been premised upon the failure to act in the face of actual knowledge.

III. PRECLUSION FOR FAILURE TO INTERVENE IS BOTH CONSTITUTIONAL AND CONSISTENT WITH ESTABLISHED PRECLUSION LAW

Respondents argue that there is no basis in the decisions of this Court for a theory of preclusion based upon the failure of nonparties to intervene in litigation which implicates their interests, and that any such result necessarily violates due process. In order to make that claim, they strain mightily to distinguish this case from *Penn-Central Merger and N&W Inclusion Cases*, 389 U.S. 486 (1968). In *Penn-Central*, several actions filed in various states challenging the findings of the Interstate Commerce Commission were stayed pending a

determination on the merits of one of the actions filed in New York federal court. Because all plaintiffs were free (though not required) to intervene in the New York suit, this Court held that those plaintiffs who chose not to intervene were nevertheless bound by the result of the New York proceedings:

> All parties with standing to challenge the Commission's action might have joined in the New York proceedings. In these circumstances, it necessarily follows that the decision of the New York court . . . precludes further judicial review or adjudication of the issues upon which it passes.

389 U.S. at 505-506.

Respondents fail in their efforts to distinguish *Penn-Central*. They argue that preclusion of the claims of non-intervenors was justified in the particular circumstances of that case because the "potential scope of litigation seeking review of I.C.C. orders was so great" in that context. Wilks Br. at 23. Yet, the same is true here. The interests of each and every nonminority employed by the defendant are always implicated by every Title VII suit seeking promotional remedies. Particularly where, as here, the defendant is a public employer, nonminority employees will often number in the thousands. If each nonminority employee had an absolute right to file an independent lawsuit to challenge the lawfulness of the remedy once it operated ostensibly to deprive him of a particular employment opportunity, the resulting lawsuits would be legion. Virtually every current and future injunctive decree vindicating public rights would be subject to a labyrinth of interminable relitigation. Here, too, the "potential scope of litigation" is great indeed.

Just as telling is the respondents' ineffectual attempt to distinguish *Penn-Central* on the grounds that the claims of the non-intervening parties in *Penn-Central* were identical to the claims of the parties to the New York proceedings which "were considered on the merits" by the trial court. Wilks Br. at 23-24. Again, the same is true in this case. Here, in the six years since they filed the Reverse Discrimination Litigation, the white employees have not presented *any* argument con-

cerning the lawfulness of the Decrees that was not urged on their behalf at the Fairness Hearing *before* the Decrees were approved. J.A. 735-737. Judge Pointer expressly considered and rejected those arguments, concluding that there was "more than ample" evidence of discrimination and that the Decrees were *not unconstitutional.* Pet. App. at 246a. Here, as in *Penn-Central,* the claims now made by respondents, although asserted by others on their behalf, were considered on the merits and rejected.

Finally, both the *Wilks* respondents and the United States are quick to emphasize that this Court in *Penn-Central* "refused to preclude further proceedings" altogether. They rely on the Court's holding that while the parties to the New York proceeding and those who failed to intervene "were precluded from relitigating the merits of the merger order," the Court left the non-intervenors free "to challenge in court specific steps taken pursuant to the consolidation believed to have detrimental effects upon them." Wilks Br. at 24; U.S. Br. at 14-15, n. 9. However, this tenet of *Penn-Central* also is fully consistent with the City's proposed rule. Under the rule here espoused, nonminority employees who elect not to intervene in the original Title VII litigation would be precluded from relitigating the *lawfulness* of any resulting affirmative action decree. However, they would remain free to challenge any subsequent employment decisions affecting them on other grounds — *e.g.,* on the grounds that the decision is not contemplated (and therefore not protected) by the Decree.

Penn-Central establishes that it is not a violation of due process to bind nonparties to the results of known litigation which seeks to resolve issues in which they claim an interest, so long as the nonparties had an opportunity to intervene in the original proceeding if they wished to do so. This principle finds added support in *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968), and in the decisions of this Court upholding the Bankruptcy Act and other statutes providing for resolution of the claims of all interested persons in a single proceeding whether or not they choose to assert their claims in that proceeding. *See, e.g., NLRB v.*

Bildisco & Bildisco, 465 U.S. 513 (1983); *New York v. Irving Trust Co.*, 288 U.S. 329 (1933).[1] Moreover, the majority of the courts of appeals which have adressed the issue have recognized the validity and wisdom of applying such a rule in Title VII litigation. Respondents ignore the clear import of this authority.

Finally, the contention that it constitutes a judicial modification of Title VII's statute of limitations to deny nonminority employees "two bites at the apple" is meritless. Requiring nonminority employees to intervene in the original Title VII litigation if they wish to object to the relief sought is fully consistent with Title VII's claims-filing limitation. In enacting 42 U.S.C. § 2000e-5(e)(f), Congress did not intend to guarantee nonminority employees the unfettered right to abstain from participating in Title VII proceedings of which they are aware and file a second, separate lawsuit of their own if the remedy imposed in the first is not to their liking.

Title VII's claims-filing limitation governs the timeliness of an original charge of discrimination. Once a Title VII lawsuit seeking promotional relief is commenced, however, nonminority employees aware of the relief sought know that if plaintiffs are successful (whether by consent decree or by unilateral judgment), race-conscious goals may be used to ensure that more blacks will be promoted to achieve the representation at all levels of employment which would have existed but for the discrimination. From this stage forward, nonminority employees are "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest. . . ." Fed. R. Civ. P.24(a).

It defies common sense to contend that Congress nevertheless intended its claims-filing limitation to relieve non-

---

[1]This is not to say that because it occurs in bankruptcy, it must occur here. The point is that if preclusion for failure to act violated due process, such legislation as the Bankruptcy Act would be unconstitutional; Congress could not permissibly enact legislation requiring that result. Because Congress has, with the approval of the Court, provided that judicial proceedings can resolve the claims of those who elect not to participate, it must necessarily be consistent with due process. Nothing Respondents have said contradicts that simply syllogism.

minority employees of any obligation to assert their objections to the relief in the original litigation, and to guarantee them the right to challenge the lawfulness of such remedies in subsequent lawsuits. Nothing in Title VII supports such a theory. There is no indication that Congress contemplated that the validity of affirmative action remedies resulting from one lawsuit could be attacked in another, and therefore it could not have intended Title VII's filing limitation to have such an effect.

This conclusion finds clear support in the Congressional policy favoring settlement of Title VII claims, *see, e.g., Carson American Brands, Inc.*, 450 U.S. 79, 88 n. 14 (1981), and in EEOC regulations implementing Title VII. Those regulations recognize that employers are "entitled to rely on orders of courts of competent jurisdiction . . . whether entered by consent or after contested litigation." 29 C.F.R. § 1608.8. The regulations therefore provide that "actions taken pursuant to the direction of a Court Order cannot give rise to liability under Title VII." *Id.* These regulations implementing Congress' intent squarely foreclose respondents' argument that Title VII's limitations period would be judicially abrogated by a rule precluding non-intervenors with notice from collaterally attacking the lawfulness of action taken pursuant to Consent Decrees.

Respondents' contention that the intervention approach would require them to assert their claims before they have accrued is similarly flawed. To say that no claim has "accrued" at that time begs the question. Where the goals and timetables at issue have been judicially determined to be lawful, no "reverse discrimination" claim can "accrue" from employment decisions contemplated by the decree. Obviously, the question of whether a particular employment decision was within the terms of the decree is one that does not arise until the particular employment decision is made. However, that is not the question respondents are precluded from now litigating under the collateral attack doctrine. The question here is simply *when* the nonminority employees are allowed to challenge the basic lawfulness of the underlying affirmative action relief itself. Clearly, Rule 24 allows them to

do so as soon as such relief is requested by the original minority plaintiffs. Whether or not they have actually been denied promotions or other opportunities at that time, the nonminority employees have *existing* interests (in the availability of promotional opportunities) which are in fact implicated by the relief sought and which can in fact be asserted in opposition to the entry of that relief. There is nothing Draconian in holding that nonminority employees who choose not to object to the lawfulness of relief in the litigation in which it is requested may not revisit that particular issue later.

The flaw in respondents' argument concerning the accrual of their claims is revealed by their own proposed "joinder" approach. Respondents concede that they would have been bound to the result of the original litigation had they been joined pursuant to Rule 19, Fed. R. Civ. P. Wilks Br. at 32-34, 46. Yet, under either joinder or intervention, the nonminority employees are forced to assert their interests before the relief is entered and before any one of them has a promotional opportunity deferred. Neither the joinder approach nor the intervention approach abrogates any claim limitations period, however. Both approaches are permissible means of achieving finality, and neither requires the nonminority employees to assert any interest that is not already existing and threatened at the time the original lawsuit is filed. As a practical matter, however, the joinder approach is so prohibitively burdensome, wasteful and impractical a means of ensuring finality in public rights litigation that it cannot realistically be utilized.

Nor does the fact that the original litigation was concluded by consent decree (after seven years of litigation and two full trials) rather than litigated judgment alter the analysis in any way. *See* Wilks Br. at 44. ("It is wholly unrealistic to require [BRFS employees] to foresee that their employer will settle rather than litigate"). Again, it was the relief sought by the original minority plaintiffs from the outset which threatened to affect directly the existing interests of nonminority employees. Those interests stood to be "impaired or impeded" to the same extent whether affirmative action relief

was awarded by the trial court on its own upon litigated judgment or through a court-approved consent decree.

Significantly, neither the United States nor the Wilks respondents dispute petitioners' claim that they would not have been entitled to relitigate the lawfulness of any remedies ordered by the trial court on its own initiative if the original Title VII claim had been litigated to conclusion in their absence. Having chosen not to assert their objections in the original litigation, respondents legitimately may be deemed to have assumed the risk that remedies affecting their interests might be imposed either upon unilateral judgment or consent decree. The nonminority employees certainly had no right to expect that the employer would defend the case to the bitter end no matter how inevitable the result. Moreover, the nonminorities could not expect the City of Birmingham to continue to ignore the interests of its minority workers. As respondents themselves have admitted, "[f]rom the beginning, the Board and the City represented a wide range of occupations in the public sector and had different cost-benefit settlement interests, and incentives," from the nonminority employees. (Wilks Br. at 21). The nonminorities cannot claim they assumed the risk that the suit might result in affirmative action remedies only if the original suit was litigated to conclusion.[2]

---

[2]In any event, as pointed out in the City's initial brief, there is no principled basis upon which to say that preclusion of nonminority employees is consistent with due process if the original Title VII claim is concluded by litigated judgment to which they were not parties, but inconsistent with due process if the original claim is concluded by a court-approved consent decree. As noted by the Eleventh Circuit below, the "same principles of res judicata and collateral estoppel that govern ordinary judgments" govern the preclusive effect of consent decrees. *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987). The City submits that in either case, due process permits the conclusion that nonminority employees whose interests are implicated by the affirmative action relief sought by Title VII plaintiffs must assert their objections to the lawfulness of that relief before it is entered in the first place.

IV. JOINDER IS NOT A VIABLE MECHANISM FOR ENSURING FINALITY IN PUBLIC RIGHTS LITIGATION

No party disputes the proposition that finality must be attainable in public rights litigation. Nor has anyone suggested any mechanism for achieving that result other than Rule 24 intervention or Rule 19 joinder. Given those options, the choice is easy. Joinder cannot be utilized in complex public rights litigation without placing intolerable burdens on all concerned and creating impossible dilemmas for the trial court. On the other hand, Wilks' primary objection to intervention centers on due process concerns, concerns which the City has dispelled. The intervention approach is constitutional, and it is the demonstrably superior alternative.

The manifold problems inherent in joinder of every potentially affected nonparty prevent joinder from being a viable means to attain finality in complex public rights litigation. The Wilks respondents completely ignore the overwhelming difficulties, Wilks Br. at 46; the federal government understates them and concludes they must necessarily be tolerated. U.S. Br. at 21.[3] However, respondents have neither rebutted the insurmountable barriers to joinder in public rights litigation identified by the City nor attempted to answer the numerous difficult questions presented by joinder as the sole avenue to finality in such litigation. *See* City Br. at 32-34.

The Wilks respondents contend that the intervention alternative prejudices nonminority employees. They contend, for example, that it will encourage unnecessary participation in litigation and force the nonminority employees of a Title VII defendant to run the risk of liability for the attorneys' fees of the plaintiff class. Of course, the same dangers necessarily obtain if the employer is required to join

---

[3]The government also argues that the joinder approach is consistent, and the intervention approach inconsistent, with the Federal Rules of Civil Procedure. U.S. Br. at 18. The City has already demonstrated that the converse is true. City Br. at 29-35.

all potentially interested nonparties in order to achieve finality. Similarly, respondents complain that under the City's rule an intervening nonminority employee would be forced to incur the expenses of hiring counsel to assert claims before losing any promotion or suffering direct injury. Yet if joinder were required to achieve finality, *every* nonminority would be forced to incur those same expenses at the same stage. At least under the City's rule, the choice of whether to participate is left to each individual employee.

The same is true of every colorable objection that respondents assert in opposition to the intervention approach: the same difficulty exists, to an equal or greater degree, under the joinder approach. To the extent nonparties are inconvenienced or disadvantaged by the requirement that they participate in the original litigation, mandatory joinder forces that participation on all of them. Intervention, on the other hand, allows each affected nonparty to make his own decision as to whether the possibility of detriment warrants an investment of time and expense in litigation. Additionaly, as shown in the City's initial brief, joinder creates serious difficulties not shared by intervention.

V. UNDER THE FACTS OF THIS CASE, RESPONDENTS SHOULD BE PRECLUDED FROM RELITIGATING THE LAWFULNESS OF THE CONSENT DECREES

Respondents cry that preclusion would violate due process because notice of the Fairness Hearing was ineffectual and "no adequate hearing was provided." Respondents' emphasis on the Fairness Hearing misconceives the full import of the City's argument. While the Fairness Hearing itself provided the process that was due, respondents were accorded due process long before the Fairness Hearing. Respondents had *notice* of the original litigation and the *opportunity* to participate fully in all aspects of that litigation through intervention. That is all due process requires.

From the outset of the litigation in 1974, the white firefighters were on notice that if plaintiffs obtained the

relief they demanded, blacks would be hired and promoted to achieve the representation at all levels of employment that would have existed but for discrimination in the existing system. One unambiguous *purpose* of the litigation was to establish promotional opportunities for blacks who had previously been excluded even from consideration for promotion — a result that would necessarily reduce the number of promotions which would otherwise have been allocated exclusively to whites under the pre-Decree selection methods. From the moment the original suit was filed, the white firefighters had "an interest relating to . . . the subject of the action" and were "so situated that the disposition of the action may as a practical matter impair or impede [their] ability to protect [their] interest." Rule 24, Fed. R. Civ. P. It was therefore incumbent upon them to intervene in the original litigation if they wished to assert any objections to the relief sought. Yet, despite knowledge of the pendency and import of the litigation, the white firefighters elected not to participate.

The victory of the black plaintiffs in the first trial — addressing entry level examinations — provided additional impetus to intervene. (J.A. 553) The judgment of the trial court following the first trial (affirmed on appeal) put respondents on notice that: 1) defendants had discriminated against blacks at the entry level, which necessarily had an impact on blacks' promotional opportunities, in and of itself a sufficient basis for affirmative promotional remedies; 2) the Board's validation methodology was deficient, indicating that the promotional examinations would ultimately be held invalid, since they were developed under the same procedures as the entry level examinations struck down in the first trial; and 3) the trial court was prepared to award the affirmative action relief sought by the plaintiffs. At that point, the possibility that the discrimination litigation would affect the interests of white male employees became a likelihood. Yet, they again elected not to participate in the litigation.

The white employees thus remained voluntarily absent from the second trial in August, 1979 concerning promo-

tional practices alleged to be discriminatory against blacks and women. *See, e.g.*, DX 1428 and 1429, R10-1280-81. While he completed only a portion of his opinion after the trial, Pet. App. 237a, Judge Pointer unequivocally indicated that the evidence established pervasive discrimination that would have justified injunctive releif in any event:

> While the only judicial finding of discrimination thus far entered has been with respect to the effect upon black applicants of the Personnel Board's tests for police officer and firefighter, it can hardly be doubted that there is more than ample reason for the Personnel Board and the City of Birmingham to be concerned that they would be in time held liable for discrimination against blacks at higher level positions in the police and fire departments and for discrimination against women at all levels in those departments. The proposed consent decrees, by way of settlement for such potential liability, provide appropriate corrective measures reasonably commensurate with the nature and extent of the indicated discrimination.

Pet. App. 244A.

The facts show that respondents had an almost five-year opportunity to intervene and protect their interests. Their entitlement to a hearing was neither absolute nor inalienable; the *opportunity* for a hearing is all due process bestows. Before the Fairness Hearing was even on the horizon, respondents had an opportunity over the course of several years to intervene in the original litigation and thereby enjoy the full panoply of rights accorded parties.

The Fairness Hearing gave respondents an opportunity to have their objections considered despite their decision to remain nonparties. It certainly provided "an opportunity for a hearing appropriate to the nature" of this case. Especially given seven years of known litigation in which the observant but silent white firefighters failed to intervene, and given the irrebuttable evidence of discrimination developed in that litigation, the Fairness Hearing provided an opportunity to be heard that was fully appropriate to the nature of their objections.

Respondents complain that they were "not able to engage

in discovery, [and] could not call witnesses or offer evidence. . . . " Wilks Br. at 30. Not true. Respondents cannot claim they were denied those opportunities because they *never* sought those opportunities. Indeed, the trial court solicited evidence from the objectors — but they expressly declined to present any. J.A. 732. If respondents, in restrospect, received less of a hearing than they now believe desirable, it was due exclusively to their failure to seize the ample opportunities for such a hearing. Given the additional opportunities they deliberately bypassed, the Fairness Hearing was a constitutionally adequate hearing appropriate to the nature of the objections there argued on behalf of the white firefighters. Respondents were accorded the right to present every argument at their disposal, and they exercised that right. To this day, respondents have not asserted any argument challenging the validity of the Decrees that was not made at the Fairness Hearing.

In light of these facts, it is evident that the white firefighters received all the process they were due under the circumstances of this case. The objections to the lawfulness of the Decrees which they now urge were presented on their behalf to the trial court through their present counsel before the Decrees were approved, and were rejected on the merits. If they wished the right to conduct discovery and develop evidence to support their objections, that opportunity was available. They had only to intervene at a reasonable point in advance of either of the two trials, and they would have then enjoyed all the procedural rights accorded to those who are parties in litigation, including the right of appeal. That they deliberately elected not to avail themselves of that opportunity does not demonstrate any deficiency in the process accorded them.[4]

---

[4]*See, Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982), holding that the Due Process Clause contemplates "reasonable procedural requirements for triggering the right to an adjudication," and a court "certainly accords due process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule." The timeliness requirement of Rule 24 is certainly a reasonable procedural rule, and it is evident that the white firefighters failed to comply with that requirement.

Preclusion in these circumstances is clearly authorized by decisions of this Court, decisions which predated the deliberate choice made by respondents. *See e.g., Penn-Central Merger & N&W Inclusion Cases,* 389 U.S. 486 (1968); *Provident Tradesmens Bank & Trust Co. v. Patterson,* 390 U.S. 102 (1968). *See also Cummins Diesel Michigan, Inc. v. The Falcon,* 305 F.2d 721, 723 (7th Cir. 1962); *Black & White Children v. School District,* 464 F.2d 1030 (6th Cir. 1972); *Prate v. Freedman,* 430 F.Supp. 1373 (W.D.N.Y. 1977), *aff'd,* 573 F.2d 1294 (2d Cir. 1977), *cert. denied,* 436 U.S. 922 (1978).

As this Court explained in *Patterson,* if the white employees are now held to be foreclosed from relitigating the lawfulness of the Decrees, they "will not have been prejudiced by the failure of the District Court here to order [them] joined," but by their own failure to intervene. *Patterson,* 390 U.S. at 115. Whatever additional opportunities respondents might otherwise have had were "lost by [their] own inaction." *Id.* at 114. As the Eleventh Circuit reasoned in rejecting their attempt to intervene as untimely, the "BFA members, having made an apparently ill-advised decision to rely on others to advance their interests, knowing that they could be adversely affected, cannot now be heard to complain." *United States v. Jefferson County,* 720 F.2d 1511 (11th Cir. 1983), J.A. 155. It will be ironic indeed if respondents are rewarded rather than estopped for their inaction.

CONCLUSION

For the reasons cited above and in the City's initial brief, this Court should reverse the decision of the Eleventh Circuit and remand with instructions that these cases be dismissed as impermissible collateral attacks. The respondents chose to remain nonparties although they knew the original litigation implicated their interests. The objections to the lawfulness of the Consent Decrees which they now seek to make were made on their behalf before the Decrees were entered, and were rejected on the merits. At this point the City is due a

decision in its favor and an end to fourteen years of costly litigation.

Respectfully submitted,

JAMES K. BAKER
City Attorney
CITY OF BIRMINGHAM
600 City Hall
Birmingham, AL 35203
(205) 254-2372

JAMES P. ALEXANDER
Counsel of Record

ROBERT K. SPOTSWOOD
RICHARD H. WALSTON
MICHAEL R. PENNINGTON
BRADLEY, ARANT, ROSE
& WHITE
1400 Park Place Tower
Birmingham, AL 35203
(205) 252-4500